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VIRGINIA LAW REGISTER.

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THE opinion in *Ellington v. Moore*, by Judge Lamb of the Chancery Court of the city of Richmond, published in full elsewhere in this number, involves some questions of unusual interest in connection with suits to avoid fraudulent conveyances. The opinion maintains that a personal decree may be had against a fraudulent alienee, who has disposed of the property to a third person; that if there be actual fraud, the deed will not be allowed to stand as security for a *bona fide* debt, due by the grantor to the fraudulent alienee, though the debt be a part of the consideration for the conveyance; and, on the principle that there is no contribution amongst tort-feasors, creditors may proceed against one fraudulent alienee for the full value of the property received by him, without making other fraudulent alienees parties—or, if made parties, without taking a decree against them; and, in such case, the alienee thus bearing the whole burden, to the extent of the property received by him, is not entitled to a decree over against other fraudulent alienees for contribution.

All of these conclusions seem to be based on the soundest principles of equity. The opinion is most convincing, and we commend it to the careful perusal of members of the bar.

IN *Matney v. Ratliff*, 31 S. E. 512, the Virginia Court of Appeals affirms, without discussion, the long-established doctrine in this State that the provision of section 635 of the Code, declaring a forfeiture to the Commonwealth of all lands not entered on the tax books within five years after notice by the commissioner of revenue, operates, by mere force of the statute, to vest title in the Commonwealth, without any inquest or other judicial proceeding.

In the recent case of *King v. Mullins* (May 31, 1898) the Supreme Court of the United States had occasion to discuss the question of the constitutionality of a similar provision embodied in the Constitution of

West Virginia. The court reviewed all of the Virginia cases, and its reasoning would lead to the conclusion that such a provision deprives the owner of his property without due process of law and is unconstitutional. The West Virginia law was upheld on the express ground that provision was made by statute for giving the owner his day in court, and an opportunity to contest the forfeiture. The case has not yet been officially reported. It is noticed in 4 Virginia Law Register, 194. The probability is that the Virginia statute would not stand the test before the United States Supreme court.

IN *Newberry Land Co. v. Newberry*, 95 Va. 119 (3 Va. Law Reg. 584) it was held, and rightly as we believe, that section 2415, which provides that "if a covenant or promise be made for the sole benefit of a person with whom it is not made . . . such person may maintain in his own name any action thereon which he might maintain in case it had been made with him only . . ." does not authorize an action by one who is neither mentioned by name nor referred to in the indenture, nor a privy to some party to the instrument.

But under another section of the Code it would seem that one may sue as beneficial owner under a deed *inter partes*, though his interest nowhere appears on the face of the instrument. The section referred to is 2860. It provides that "the assignee or *beneficial owner* of any bond, note, writing or *other* chose in action, not negotiable, may maintain thereon, in his own name, any action which the original obligee, payee or contracting party might have brought."

Prior to the Code of 1887 this section applied only to "assignees" of choses in action. But by the revision of 1887 it was extended to a "beneficial owner." We know of no decision construing the effect of this change, but the language seems broad enough to apply to *any* beneficial ownership, howsoever evidenced—whether appearing on the face of the instrument or otherwise. For example: A, as agent of B (whether disclosed or undisclosed), lends money to C, evidenced by the latter's bond, payable to A. B could not, at common law, maintain an action thereon in his own name, unless his interest appears on the face of the instrument—and not even then if the instrument were *inter partes* and under seal. Under the ruling in the *Newberry Case*, the real principal and beneficial owner is still incapacitated to sue in his own name, under section 2415, unless named or pointed out in the instrument. But it is believed that under section 2860, B might in such case maintain the action in his own name as "beneficial owner,"

though his interest nowhere appears on the face of the instrument—and this, whether the instrument be a deed poll or deed *inter partes*.

So, in the *Newberry Case*, if there had been proper allegations and proper proof of the plaintiff's beneficial ownership of the rights sought to be enforced in the action, the probability is that the action might have been sustained.

THE attention of the profession of the State is called to the communication of Mr. Wm. E. Crawford, of the Richmond bar, published elsewhere in this number, pointing out the important and unfortunate fact that the doctrine that possession of real estate is notice to purchasers, established in *Chapman v. Chapman*, 91 Va. 397, is still the law of Virginia, notwithstanding its abolition by the legislature of 1895-6. The restoration of the doctrine of that case is brought about by an amendment of section 2465 of the Code by the legislature of 1897-8, in which the previous amendment of that section, abolishing the doctrine in question, is omitted. The omission was probably not intentional, but the result of carelessness, and the omission should be restored by the next legislature. The injustice and inconvenience of the principle were pointed out in 1 Va. Law Reg. 204.

The amendment in question, while important for what it omits, is equally important for the addition it makes to the list of transactions required to be recorded, namely, bills of sale and executory contracts of sale of personal chattels, where possession remains with the seller.

Until this amendment, it was an established principle in Virginia, that retention of possession by the seller of the thing sold, was *prima facie* fraudulent as to his creditors (*Davis v. Turner*, 4 Gratt. 422), and conclusively fraudulent as to subsequent *bona fide purchasers* for value. (*Glasscock v. Batton*, 6 Rand. 78; *Benjamin v. Madden*, 94 Va. 66; article by George Pilcher, Esq., of the Norfolk bar, in 3 Va. Law Reg. 501.) Nor did the statutes of registry contemplate or authorize the recordation of ordinary executory contracts for the sale of personal chattels. (*Braxton v. Bell*, 92 Va. 229.)

The language of the amendment is, "Every bill of sale, or contract for the sale, of goods and chattels, where the possession is allowed to remain with the grantor (and any such bill of sale or contract shall be in writing and signed by the vendor)" shall be void, etc., until recorded.

Title to personal property requires no deed or other writing for its transfer. Hence to provide that "every *bill of sale* . . . shall

be in writing" still leaves the parties free to buy and sell without any writing. The effect of the amendment is to leave the law as it was before, where there is no bill of sale or written contract to sell, and possession is retained by the seller. But if the buyer desires to leave the property in the seller's possession, without encountering the risk of losing it to creditors of or purchasers from the seller, he must, where there is an executed contract, take a "bill of sale" (which the statute does not require to be under seal), or, if executory, a written contract to sell, and either must be duly recorded. The situation may be thus indicated:

(1) A sale, or contract to sell, *without writing*, possession being retained by the seller:

- (a) As to *creditors*—*prima facie* fraudulent.
- (b) As to *purchasers*—conclusively fraudulent.

(2) A sale, or contract, *in writing*, possession being retained by the seller:

- (a) Not recorded—void as to creditors and purchasers.
- (b) Recorded—valid as to creditors and purchasers.

It will be observed that failure to record the writing (where there is one) leaves the buyer precisely where he would have been at common law as to subsequent *purchasers*, but his risk is increased as to *creditors*—since at common law retention of possession is only *prima facie* fraudulent as to creditors while, under the statute, retention of possession by the seller, where there is a written but unrecorded bill of sale or contract, is absolutely void as to creditors as well as purchasers.

IN *Meyer v. City of Richmond*, 19 Sup. Ct. 106, the Supreme Court of the United States affirms a judgment of the Law and Equity Court of the city of Richmond, and of the Supreme Court of Appeals in refusing a writ of error to the judgment, denying to a lot owner the right to recover for consequential damages from closing of the street at a point not opposite his premises.

In 1886, the city of Richmond, under ample legislative authority, passed an ordinance permitting the Richmond & Alleghany Railroad Company to close Eighth street below Cary, near Canal street, and to build an overhead bridge for pedestrians only. The plaintiff owned a lot fronting on Eighth street, between Canal and Cary streets, on which were two brick buildings, occupied as stores and dwell-

ings. The point at which the obstruction was placed was not opposite his premises, but was lower down on the same block.

The action was to recover damages for the depreciation of the value of plaintiff's property by the arresting of travel along the street in front thereof.

A demurrer to the declaration was sustained in the lower court, and a writ of error was refused by the Court of Appeals. This judgment the Supreme Court of the United States affirms, on the authority of *Home Building etc. Co. v. Roanoke*, 91 Va. 52, and of numerous decisions of the Supreme Court, holding that where there is no physical invasion of the owner's property, consequential damages do not constitute a "taking" under the constitutional prohibition against taking private property for public use, without just compensation. (Art. V, sec. 14, Va. Const.) Mr. Chief Justice Fuller and Mr. Justice Gray dissented.

Mr. Justice Peckham, who delivered the opinion, points out the well established distinction between constitutional provisions which prohibit merely the "taking," and those which forbid "taking or damaging" private property, without just compensation—the former applying, in general, only to injuries resulting directly from an encroachment upon or a physical invasion of the plaintiff's property, and not to acts done in the proper exercise of governmental power, resulting in consequential injury, without such encroachment.

The same distinction is made in connection with the grading of streets. In those States whose constitutions prohibit the "taking" merely, no recovery can be had for consequential injuries due to the proper exercise of the power to grade—and the abutting owner cannot recover for injury to his property by reason of its being left above or below the new grade, or for the removal of lateral support. 2 Dillon, Munic. Corp. (4th ed.), 992 *et seq.*; monographic note to *Goddard v. Inhabitants etc.* (Me.), 30 Am. St. Rep. 376, 389 *et seq.*; *Powell v. Wytheville*, 95 Va. 73; *Chicago v. Taylor*, 125 U. S. 161; *Johnson v. Parkersburg*, 16 W. Va. 402 (37 Am. Rep. 779); note to *O'Brien v. Philadelphia* (Pa.), 29 Am. St. Rep. 835–850. The case of *Stearnes v. City of Richmond*, 88 Va. 992, seems to have confused the two principles. See 1 Va. Law Reg. 619.

As to the right of a municipal corporation to alienate or close a street, it seems to be well settled that the power does not exist, save under plain legislative sanction. *Chicago etc. R. Co. v. Quincy*, 136 Ill. 563 (29 Am. St. Rep. 334); 2 Dillon, Munic. Corp. 657, 666. And though this power to vacate rests in the legislature, yet lot

owners, whose properties abut on that portion of the street so vacated, are entitled to compensation, even under the narrower constitutional provision against "taking," and *a fortiori* where the prohibition extends to "damaging" private property. The vacation of the street is a physical encroachment upon the right of way, which is an appurtenance to the lot. See *Heinrich v. St. Louis*, 125 Mo. 424, reported also in 46 Am. St. Rep. 490, with a note collecting the authorities. As shown in the note to this case, the authorities are not altogether harmonious. See also 2 Dillon, Munic. Corp. 666, n.